Exhibit 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

UNITED STATES OF AMERICA,	§	
Plaintiff	§	
	§	
V.	§	**CRIMINAL ACTION NO. C-06-563**
	§	
CITGO PETROLEUM CORPORATION,	§	
CITGO REFINING AND CHEMICALS	§	
COMPANY, L.P.,	§	
Defendants		

REPLY IN SUPPORT OF MOTION OF COMMUNITY MEMBERS TO BE DECLARED VICTIMS UNDER THE CRIME VICTIM RIGHTS ACT

COME NOW, JOEL MUMPHORD, ROSALINDA ARMADILLO, JEWELL ALLEN, DAVE GALLOWAY, MAVIS BRANCH, FELICIANO CANTU, ROBE GARZA, DIANA LINAN, THELMA MORGAN, JAMES SHACK, JEAN SALONE, JULIAN GARCIA, JOHN GARCIA, and BETTY WHITESIDE (hereinafter "community members"), individuals who file this reply in support of their motion pursuant to the Crime Victim Rights Act, 18 U.S.C. § 3771(d)(1), for the Court to recognize them as crime victims.

Defendant CITGO argues that the community members are not victims of its crimes, even while conceding that it forced the members to breathe "noxious gases" and to suffer emotional trauma. CITGO's interpretation defies the plain language of the CVRA, which requires only a showing of "harm" to obtain victim status. CITGO also labels as "theoretical" the community members' argument that they have been harmed by being placed at risk of deadly cancers. But what may be theoretical to the company is an all-too-real danger for the community members. For this reason as well, the community members are victims under the CVRA.

Perhaps recognizing the weakness of its position on the merits, CITGO also attempts to interpose frivolous procedural objections. But alleged time limits in the Federal Rules of ***Civil***

Procedure have no application to this ***criminal*** case. Under the CVRA, the community members have 14 days ***after sentencing*** to seek review of the Court's ruling on their own motion asserting their victim status. Because the community members' filed their own, independent motion to be recognized far in advance of the sentencing hearing, their assertion of rights is timely.

ARGUMENT AND AUTHORITIES

I. CITGO Created Victims Under the CVRA When Its Crimes Forced Community Members to Breathe Noxious Gases and Suffer Emotional Harms.

CITGO concedes that its crimes compelled the community members to breathe benzene-laden fumes. The record in this case requires this concession. Undisputed evidence shows, for example, that on December 18, 1995 the Texas Commission on Environmental Quality (TCEQ) traced odors to the area of tanks 116 and 117 when a complaint from the Hillcrest area reported a "strong, pungent odor causing respiratory irritation." Dist. Ct. Doc. #690 at 6. Similarly, on November 7, 1996 the TCEQ investigated three separate complaints of odors that were also causing health effects. The initial complaint received at the TCEQ office involved a strong odor that was nauseating and making the complainant dizzy. Each of the other complainants reported similar symptoms and said the odor was getting stronger. The assigned investigator from the TCEQ also complained of dizziness, nausea and a headache from the odor event that was traced directly to tanks 116 and 117. *Id.* at 6-7.

In the face of such clear evidence of harm, CITGO's only response is that "[e]very person in an industrial society is frequently exposed to noxious gases." CITGO Resp. at 14. What CITGO fails to recognize is the significant difference between an accidental exposure and a *crime*. Whatever other indignities may attend a modern society, the community members had a right to live their lives without suffering from criminal releases of deadly chemicals. Congress

and state legislatures have allowed some activities that produce noxious gases (such as driving a car to work) while criminalizing others (such as operating the CITGO East Plant Refinery without an emission control device to prevent the release of deadly benzene). When a person breathes noxious gases from a car, he has been harmed – but not harmed by a crime. In clear contrast, when the Community Members breathed noxious gases criminally released by CITGO, they were "directly and proximately harmed as a result of the commission of a federal offense," 18 U.S.C. § 3771(e) – which creates "crime victim" status.

CITGO does not contest that its crime directly and proximately caused the community members to breathe a chemical cocktail of ethyl-benzene, styrene, methyl-butyl ether, and a host of other hazardous chemical compounds. CITGO also does not dispute that no sane person would voluntarily choose to breathe such a concoction – particularly where it would cause respiratory irritation, nausea, and dizziness. CITGO also cannot deny that the Community Members had a right protected by the criminal environmental laws (specifically 42 U.S.C. § 7413(c)(1)) to not have to breathe these potentially dangerous fumes. It is well recognized that the criminal law recognizes harm when there is an "invasion of any social interest which has been placed under the protection of a criminal sanction (whether by common law or statute) . . . ." ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 830 (3d ed. 1982). The community members here suffered from precisely such an invasion – specifically an invasion of their right not have these deadly chemical released into the air that they breathed.

Not only did CITGO force the community members to breathe noxious gases, but it also inflicted emotional harm. As is undeniable based on the evidence before this Court, the community members have suffered – and will continue to suffer – emotional trauma wondering whether they will develop cancer because of the defendant's crimes. CITGO does not contest,

for example, that Ms. Cantu (one of the community members bringing this motion) testified: "I would get depressed a lot because I was always wondering, with the extent of the odors and the flares, I would wonder if we were going to wake up the next morning because, sometimes, we would even get the odors inside through our AC unit." Dist. Ct. Doc. 690 at 15 (*citing* Tr. May 1, 2008, p.121: 1-8). The community members had no control over the chemicals CITGO spewed into the air around their homes and their workplaces. This caused them emotional distress – i.e., it *harmed* them.

Conceding that the community members have suffered emotional injury, CITGO nonetheless gamely maintains that this is not enough to create victim status under the CVRA. But the common understanding of the word "harm" is "physical *or mental* damage." *Merriam-Webster's Collegiate Dictionary* (11th ed. 2006) (emphasis added). CITGO offers no reason whatsoever for confining "victim" status to those who have been physically harmed, rather than embracing those who have suffered from crimes producing only psychic damage (i.e., attempted murder, assault, stalking, possession of child pornography, mailing threatening communications, etc.). CITGO also claims that the Community Members cannot cite "a single opinion in which a court found that emotional harm was sufficient to designate a person a victim under the CVRA." CITGO Resp. at 15 n.3. This is simply untrue. Such cases are easy to find, including most notably controlling precedent from the Fifth Circuit. *See, e.g., United States v. Wright*, 639 F.3d 679, 684-85 (5th Cir. 2011) (young girl "Amy" was a "victim" of the defendant's crime of possessing child pornography depicting her, even where she had never met the defendant and did not know he was possessing images depicting her until after conviction – mental trauma enough), *rehearing en banc granted on other grounds*, 668 F.3d 776 (2012); *In re Amy*, 646 F.3d 190, 199 n.10 (5th Cir. 2011) (same), *rehearing en banc granted on other grounds*, 668 F.3d 776

(2012). The more accurate point to be made is that CITGO cannot cite a single opinion in which a court found that that emotional harm suffered as a result of a defendant's crime was an *in*sufficient basis to designate person a victim under the CVRA.[1]

What CITGO seems to be arguing is that it is free to commit crimes that harm people, provided that the harm it inflicts does not reach a certain threshold provable only by expensive expert testimony, such as suffering from cancer that can be medically-linked to the crime through expert medical diagnosis – in other words the threshold for seeking damages under civil tort liability. But criminal prosecutions and tort cases are not the same. Congress did not place any threshold severity requirement into the CVRA. Congress could have easily written the law to provide that crime victim is a person "seriously" or "physically" harmed by a crime. It simply did not write the law that way – choosing instead to require putative victims to demonstrate only "direct and proximate" harm.

The reason why Congress chose not to place a minimum severity threshold of harm into the CVRA is clear. Congress sought to avoid protracted satellite litigation about the severity of injuries as a pre-requisite to crime victim status. More importantly, Congress clearly wanted broad protection for those harmed by crimes. The legislative history accompanying the "crime victim" definition explains that it was "an intentionally *broad definition* because all victims of

[1] CITGO cites *United States v Guidant LLC*, 708 F.Supp.2d 903, 922 (D. Minn. 2010), as standing for the broad proposition that "experiencing emotional harm as the result of a criminal act is not sufficient to confer victim status under the CVRA." CITGO Resp. at 15. This is a gross misreading of *Guidant*. That case involved a medical device manufacturer who was pleading guilty to making false statements to the FDA about the safety of its products. Ultimately, the products were recalled for safety reasons, causing emotional distress to those persons who had the products implanted in them. The narrow point of the district court's decision was that the persons using the devices had not been harmed as a result of the crime of making false statements to the FDA – rather they were harmed because of the potentially faulty medical devices. 708 F.Supp.2d at 914-15. In contrast, here the community members have been emotionally harmed as a direct result of CITGO's crime of releasing dangerous chemicals, which they then were forced to breathe.

crime deserve to have their rights protected . . . ." 150 CONG. REC. S10912 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl) (emphasis added). The description of the victim definition as "intentionally broad" was in the course of floor colloquy with the other primary sponsor of the CVRA and therefore deserves significant weight. *See Kenna v. United States District Court for the Central District of California*, 435 F.3d 1011, 1015-16 (9th Cir. 2006) (discussing significance of CVRA sponsors' floor statements).

CITGO's only response to this clear legislative history is to argue that the sponsors of the legislation did not specifically discuss environmental crimes. CITGO Resp. at 17. But Senator Kyl and Senator Feinstein hardly had time to enumerate each and every provision in the criminal code in their floor colloquy. Rather than go through the code section-by-section, they stated directly that "*all* victims of crime deserve" protection in the CVRA. The community members here are precisely the kinds of victims that Congress sought to protect. As remedial legislation, the CVRA "is to be construed broadly so as to achieve the Act's objective." *Padilla v. Lever*, 463 F.3d 1046, 1057 (9th Cir. 2006). The objective of the CVRA is to dramatically rework the criminal justice system by giving those affected by crime valuable rights, including but not limited to, an independent voice in criminal proceedings. *Kenna v. U.S. Dist. Court for C.D. Cal.*, 435 F.3d 1011, 1013 (9th Cir. 2006). The community members deserve a voice when CITGO is sentenced for crimes that forced them to breathe noxious gases.

II. CITGO HARMED THE VICTIMS BY CREATING A RISK OF FUTURE DEADLY CANCERS.

Not only did CITGO harm the community members by forcing them to breathe noxious gases and causing them emotional distress, but also by creating a risk of future deadly cancers. Exposing someone to a risk (especially of lethal cancer) is a harm, which creates crime victim status under the CVRA.

CITGO does not deny that is criminally exposed the community members on multiple occasions to a deadly, cancer-causing agents such as benzene. *See, e.g.,* 42 U.S.C. § 7412(b) (listing benzene as harmful substance). CITGO likewise does not deny that this creates a potential risk of future cancers. Its only response is that there was no absolute proof that someone would ultimately die from the cancer. CITGO Resp. at 18-19.

What CITGO does not – and cannot -- deny is that exposing someone to a risk is harming them. The arguments supporting this position are compelling. *See generally* Claire Finkelstein, *Is Risk a Harm?*, 151 U. PA. L. REV. 963, 964 (2003) (explaining why risk is a harm; collecting numerous supporting authorities). In particular, being exposed to a risk of benzene-induced cancer is clearly a harm: "I]t is clear from the fact that no normal, non-suicidal person would choose a higher rather than a lower chance of developing cancer that there is a perfectly commonsensical way in which being exposed to an increased risk of developing cancer is a setback to a person's most fundamental interests." *Id.* at 972-73. Numerous cases and other authorities support this proposition. *See, e.g., Braswell v. Flintkote Mines, Ltd.,* 723 F.2d 527, 532 (7th Cir. 1983) (finding that the plaintiff's right of action accrues upon exposure to risk). Christopher H. Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 UCLA L. REV. 439, 442 (1990).

Rather than dispute the legal underpinnings of the community members' position, CITGO tries to argue that there is no factual basis for finding that the community members have been placed at risk of developing cancer. But this Court's prior findings implicitly show the risk. This Court found: "Although tanks 116 and 117 may have caused unpleasant odors, there is no *proof* showing that the concentration of chemicals in these emissions rose to the level necessary to cause health effects. Due to these circumstances, the proof of causation before this Court is

inconclusive." Doc. #729 at 6 (emphases added). Of course, lack of "proof" means only that the risk of health effects is less than 100%; and "inconclusive" causation means that the Court could not determine – one way or the other – what is going to happen to the community members. The standard definition of "risk" is "the uncertainty of a result . . . , the chance of injury, damage, or loss." BLACK'S LAW DICTIONARY 1353 (8th ed. 2004). Unless CITGO can itself prove that the community members have a 0% chance of developing life-threatening cancers as a result of its crimes, then it has plainly harmed the community members by subjecting them to a risk.

The Court's prior findings focused on whether the cancers had currently manifested themselves, which would be appropriate in a civil case seeking damages for proven health effects. Thus, in connection with the findings just quoted, this Court made clear that it was relying on standards applicable to civil tort actions seeking recovery for manifesting adverse health conditions. Thus, this Court explained that:

> It is not surprising that in cases of chemical exposure, courts have required one theory of causation to be more likely than other theories of causation. *See Brown v. Parker-Hannifin Corp.*, 919 F.2d 308, 312 (5th Cir. 1990); *cf. Castellow v. Chevron USA*, 97 F.Supp.2d 780, 797 (S.D. Tex. 2000). Accordingly, courts have required something more than symptoms and a cause when proving causation in the context of chemical exposure. This is especially true when "working backwards" from symptoms to a cause, like in this case. *See Castellow*, 97 F. Supp. 2d at 797.

Dkt. #729 at 5-6. In saying that the courts have "required one theory of causation to be more likely than other theories," the Court implicitly acknowledged that each plausible theory of causation presents a *risk* of harm. That risk is sufficient to confer victim status, even if it not sufficient to allow recovery for money damages for a health injury. In the current posture of this case, the only issue is not whether the community members are now suffering from cancer but

rather whether they have some risk of cancer. In that posture, the Court's finding implicitly support the community members, not CITGO. [2]

It is preposterous for CITGO to suggest that medical monitoring is unnecessary because the community members have not affirmatively shown that they have gone to the doctor between April and now. CITGO has not offered any evidence whatsoever regarding the community members' health. In fact the court's own rulings on the government's motions for reconsideration note that the government offered over a thousand pages of medical records on behalf of the community members. Community members regularly consult local physicians with complaints of respiratory ailments, allergy-like symptoms, and other ailments that can be attributed to benzene exposure. However, true medical monitoring involves regular medical tests such as blood work which is expensive. The residents of the affected communities are of low and modest income, many are uninsured; they cannot afford to pay for medical monitoring, and the CVRA does not require them to pay for their own medical monitoring as a pre-requisite to being designated as victims.

When criminal activity has prompted individuals to respond to threats that turned out to be harmless, courts have still accorded victim status to those individuals. CITGO does not deny that courts have accorded "victim" status as the result of the need to respond to harmless substances when a defendant's crime necessitated the response. *See, e.g., United States v.*

[2] This same conclusion is supported by focusing on the crime of which CITGO was convicted under the Clean Air Act – i.e., failing to operate the tanks with the required emission controls in place. *See* 42 U.S.C. § 7413(c)(1). Unlike other environmental statutes (such as the Clean Water Act, that regulate the concentration of hazardous chemicals allowed in certain discharges), the Clean Air Act regulates how the equipment handling chemicals with potential for harmful air emissions is operated. The Clean Air Act recognizes that reliable measurement of the concentration of harmful chemicals after they are emitted into the ambient air is quite difficult. Therefore, the Clean Air Act creates crimes for failure to properly operate equipment handling the chemicals before the chemicals are emitted to the air. It is the community members' right to be free from criminal handling of that equipment that CITGO violated in this case.

Quillen, 335 F.3d 219, 226 (3rd Cir. 2003) (rejecting defendant's argument that "the expense of this expeditious (but in hindsight literally unnecessary) response did not result in an actual loss directly resulting from his conduct"). If responding to a harmless substance creates victim status, surely the community members' need to respond to the release of benzene and other harmful substances in their neighborhoods qualifies them as victims.

The Court should be aware of the full implications of the broad position that CITGO has staked out. CITGO is arguing that until a person can prove that he has suffered "adverse health effects," he cannot be a victim of an environmental crime. CITGO Resp. at 20. As the community members explained at length their motion, Community Members Mot. at 18-21, many environmental crimes are defined in terms of risk rather than ultimate outcome. Consider, for example, the case of a terrorist polluter, who intentionally releases massive quantities of life-threatening benzene into a community in 2012 and is prosecuted in 2013. Under CITGO's argument, the crime would be a "victimless" crime because the deadly cancers will not yet have manifested themselves, given the long latency period of cancer. *See, e.g.*, Letter from James K. Hammit, Chair, Advisory Council on Clean Air Compliance to EPA Administrator Stephen L. Johnson, July 11, 2008 (discussing study regarding lives saved from reducing benzene emissions in Houston; 30 year latency period discussed) (available at http://yosemite.epa.gov/sab/sabproduct.nsf/0/D4D7EC9DAEDA8A548525748600728A83/$File/EPA-COUNCIL-08-001-unsigned.pdf). Clearly this is an absurd reading of the CVRA.

In enacting the CVRA, Congress specifically recognized that for people such as the community members, "Their lives are significantly altered by the crime and they have to live with the consequences for the rest of their lives." 150 CONG. REC. S4268 (Apr. 22, 2004) (statement of Sen. Feinstein). The community members are victims of CITGO's crimes.

III. THE COMMUNITY MEMBERS HAVE PROPERLY AND TIMELY ASSERTED THEIR RIGHTS UNDER THE CVRA.

CITGO also attempts to prevent this Court from reaching the merits of the community member's arguments by raising a flurry of procedural objections. Those objections are meritless.

CITGO acknowledges that the CVRA allows appellate review of issues concerning victim status. CITGO, however, argues that the community members were required to seek mandamus review of this Court's April 5, 2011, decision rejecting the Government's motion to have them recognized as victims within 14 days of that decision. CITGO claims that the 14-day "statutory limit has long since passed." CITGO Resp. at 10.

Curiously, for a litigant relying on a statutory time limit, CITGO never actually quotes the language of that purported limit. The language that CITGO appears to be relying upon is found in 18 U.S.C. § 3771(d)(5),[3] which provides:

> (5) Limitation on relief**.—** In no case shall a failure to afford a right under this chapter provide grounds for a new trial. ***A victim may make a motion to re-open a plea or sentence*** only if—
> (A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied;
> (B) the victim petitions the court of appeals for a writ of mandamus *within 14 days*; and
> (C) in the case of a plea, the accused has not pled to the highest offense charged.
> This paragraph does not affect the victim's right to restitution as provided in title 18, United States Code.

(emphases added). The statute does contain a 14-day time limit, but the limit applies to a motion to "re-open a . . . sentence."[4] Obviously, the motion to "reopen" a "sentence" cannot be made

[3] The CVRA language covering assertion of rights in this district court is actually found elsewhere in the statute. 18 U.S.C. § 3771(d)(3) provides that CVRA rights "shall be asserted in the district court in which a defendant is being prosecuted. . . The district court shall take up and decide any motion asserting a victim's right forthwith." Nothing in that provision creates any time limit for a victim to assert his rights.

[4] CITGO mischaracterizes this statute at page 6 of its response, where it describes the statute as requiring that a party seeking review must "file the petition within fourteen days of the district

until the sentence has been imposed! In the context of this case, the community members' time limit for seeking appellate court review has not yet begun. The time limit will only begin to run *after* the Court imposes its sentence. At that point, the community members can allege a failure to afford them their promised right under the CVRA to speak at sentencing, 18 U.S.C. § 3771(a)(4), and seek to have the Court's sentence "re-opened" to afford them their right to speak at sentencing. In other words, they will have to seek review in the Fifth Circuit within 14 days of the Court handing down its sentence.

Any other reading of the statute leads to the absurd result of forcing an appeal of sentencing issues before the Court has decided what its sentence will be. In this case, for example, the community members might be satisfied with the sentence that the Court will impose in September. Yet, under CITGO's proposition, they were required to seek appellate review of the yet-to-be-imposed sentence months ago.[5]

It is important to emphasize that CITGO does not dispute that the community members could seek appellate review of this Court's decision to deny them victim status. CITGO contends only that the 14-day time limit has expired. But because the 14-day limit has not yet begun to run (for all the reasons just explained), the community members possess a clear right to appellate review. They could have exercised that right but lurking in the background and waiting

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court's CVRA *order*." CITGO Resp. at 6 (emphasis added). The word "order" does not appear in the CVRA.

[5] The Government would also, on CITGO's theory, have forfeited its right to pursue appellate relief long ago. This makes no sense, as the Government should not be required to pursue piecemeal appeals in a criminal case, but rather should be allowed to bring a single appeal after sentencing raising all issues related to sentencing. The community members respectfully suggest that the Government may not read the statute in the same way CITGO does and that the Court may wish to ask the Government for its view on the applicable CVRA time limits.

until the Court imposed sentence, filing (if necessary) for appellate relief at that time.[6] But rather than sandbag the Court and the parties, the community members chose to place into the record their position so that the Court and the parties would not be surprised. Nothing in the CVRA should be construed to bar forthright and transparent pleadings.

CITGO also seems to think that Federal Rule of *Civil* Procedure 59(e)'s restrictions on motions to reconsider has some bearing on the community members' motion in this *criminal* case. Because this case is a criminal case, CITGO's argument is frivolous. *See* Fed. R. Civ. P. 1 ("These rules govern the procedure in all *civil* actions and proceedings in the United State district courts . . . ." (emphasis added)). Even applying the civil rules, CITGO has cited the wrong rule. Rule 59(e) governs motions for a new *trial*. *See* Fed. R. Civ. P. 59 (entitled "New Trial; Altering or Amending a Judgment"). The applicable civil rule for a motion to reconsider an *order* is Fed. R. Civ. P. 60. That rule allows for motions to be made for reopening for grounds such as "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P . 60(a). If the Court would like briefing on the civil rules, the community members are prepared to explain why due to their lack of familiarity with the criminal justice system and their limited financial resources they were unable to obtain pro bono counsel until well after the Court's ruling.[7]

More importantly, the community members are not simply filing a motion to reconsider the Court's earlier denial of the Government's motion to recognize victims in this case. Instead, they are filing their own, independent motion to be recognized as victims. The CVRA

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[6] Whether the victims should seek mandamus review under 18 U.S.C. § 3771(d)(3) or appellate review under 28 U.S.C. § 1291 – or both – is an unsettled issue in the Fifth Circuit at this time. *See, In re Amy Unknown,* 636 F.3d 190, 194-97 (5th Cir. 2011) (Jones, J., concurring) (discussing "jurisdictional conundrum" surrounding CVRA appeals).

[7] Indeed, it is precisely because many of the Community Members' inexperience and indigency that they have now represented on a pro bono basis by the Utah Appellate Clinic of the University of Utah College of Law and the Texas Legal Services Center.

specifically allows crime victims to assert their own rights in the criminal justice process. The CVRA provides, "The crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in [the CVRA]." 18 U.S.C. § 3771(d)(1). In this case, the "crime victim's lawful representative" (specifically, attorneys from the Texas Legal Services Center and the Utah Appellate Clinic) has asserted the Community Members' own rights to be heard at sentencing. Congress specifically added this language to permit crime victims to present their claims through legal counsel. *See* 150 CONG. REC. S4260 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl) ("a crime victim may choose to enlist a private attorney to represent him or her in the criminal case-this provision [18 U.S.C. § 3771(d)(1)] allows that attorney to enter an appearance on behalf of the victim in the criminal trial court and assert the victim's rights.").

CITGO's argument seems to be that because the Government has also asserted these rights for the community members, that assertion somehow bars the victims from proceeding on their own. The community members very much appreciate the Government's efforts. But any claim that the Government's motion precludes the community members' motion is contrary to the CVRA's structure, which sought to make crime victims "independent participant[s] in the proceedings." 150 CONG. REC. S10911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl). Indeed, the CVRA's legislative history discusses the provision allowing prosecutors to assert victim's rights, making clear that the actions of prosecutors cannot in any way impair those rights:

> [T]he provision [18 U.S.C. § 3771(d)(1)] does not mean that the Government's attorney has the authority to compromise or co-opt a victim's right. Nor does the provision mean that by not asserting a victim's right the Government's attorney has waived that right. The rights provided in this bill are personal to the individual crime victim and it is that crime victim that has the final word regarding which of the specific rights to assert and when. *Waiver of any of the individual rights provided can only happen by the victim's affirmative waiver of that specific right*.

150 CONG. REC. S4269 (Apr. 22, 2004) (statement of Sen. Kyl).

In its pleading, CITGO spills a lot of ink suggesting that the community members may have been aware of litigation involving their victim status. CITGO Resp. at 2-5. But nothing in CITGO's recitation of the facts suggests (let alone proves) that any of the fourteen community members bringing this motion were ever served with notice of the Court proceedings[8] or that they have ever waived their specific right to proceed on their own. Moreover, nothing in CITGO's response suggests that the victims were ever told by the Government (or the Court) that they were required to join in the Government's earlier motion at the risk of losing their own rights. Clearly, the community members have not made an "affirmative waiver of th[e] specific right," 150 CONG. REC. S4269, to obtain victim status under the CVRA.

Also noticeably absent from CITGO's pleading is any suggestion that it has been prejudiced by the community members filing in July. The community members have not sought any new evidentiary hearing, relying solely on the record currently before the Court. Moreover, CITGO cannot plausibly claim that it is somehow unable to effectively respond to the community members' legal arguments. CITGO has filed a comprehensive response signed by no less than six distinguished attorneys (Dick DeGuerin, Matt Hennessy, Catherine Baen, James B. Blackburn, Nathan Eimer, and Daniel D. Birk) at major law firms in Houston and Chicago. The reality in this case is that the community members, men and women living in impoverished neighborhoods with limited financial resources and unfamiliar with the criminal justice process, have not somehow made a tactical decision to "delay" filing in this case (CITGO Resp. at 1) or

[8] Since CITGO appears to believe that the Federal Rules of Civil Procedure are somehow applicable to this criminal case, its failure to effect service of process on the fourteen community members as required by Rule 5 of the Federal Rules of Civil Procedure should serve as an absolute bar to any claim that the community members have forfeited any rights.

to "rely on the government" (CITGO Resp. at 9).[9] Instead, the community members were only able to secure pro bono counsel to help them protect their rights recently. Upon securing that counsel, the community members moved in a timely fashion – more than two months before sentencing -- to inform the Court and the parties of the position that they are taking now and will take on any appeal to the Fifth Circuit. The community members have fully complied with the CVRA requirements to assert their rights.

CONCLUSION

For all these reasons, the community members are "victims" entitled to rights under the CVRA. Accordingly, the Court should hold that they have the right to be heard at sentencing under 18 U.S.C. § 3771(a)(4).

Respectfully submitted,

s/ Paula Pierce

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[9] To be clear, the Community Members do not deny that there were "town" meetings about the progress of this case and "press" reports about CITGO's conviction. CITGO Resp. at 3-4. But the Community Members strongly dispute any claims CITGO is making about their personal decision-making process in this case, such as the claim that they "delayed" filing a motion or "decided" to rely upon the Government to press their claims. CITGO clearly bears the burden of proof on such claims, and it has presented no evidence (e.g., affidavits, testimony, etc.) that would possible support its position.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Reply in Support of Motion of Community Members to be Declared Victims Under the Crime Victim Rights Act has been served on counsel of record identified below.

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Dated August 23, 2012

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